

Letter HC
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AA 222-00 Hubble, John
VAR 0145

MSA-S-1829-729

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2006-0056-V

IN RE: NANCY HUBBLE

SECOND ASSESSMENT DISTRICT

DATE HEARD: MAY 30, 2006

ORDERED BY: STEPHEN M. LeGENDRE, ADMINISTRATIVE HEARING OFFICER

PLANNER: LORI RHODES

DATE FILED: JUNE 9th, 2006

RECEIVED

JUN 12 2006

CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

PLEADINGS

Nancy Hubble, the applicant, seeks a variance (2006-0056-V) to allow a dwelling, driveway and associated facilities with less buffer than required on property located along the north side of Old Highlands Avenue, west of Highland Road, Annapolis.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's web site in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 175 feet of the property was notified by mail, sent to the address furnished with the application. Doug Bourquin, a land surveyor employed by the applicant, testified that the property was posted for more than 14 days prior to the hearing. I find and conclude that the requirements of public notice have been satisfied.

FINDINGS AND CONCLUSIONS

This case concerns the same property the subject of a decision by the County Board of Appeals of Anne Arundel County in Case No. BA-54-00V (January 7, 2003). The Board's Amended Memorandum of Opinion conditionally approved variances to the 100-foot tidal wetlands buffer and the 25-foot nontidal

wetlands buffer to allow a dwelling, driveway and grinder pump.¹ At the time of the approval, Anne Arundel County Code, Article 28, Section 11-102.2 provided that a variance becomes void unless a building permit conforming to the plans is obtained within one year and construction is completed within two years. The approval having lapsed, the applicant refiled the same request.²

Suzanne Schappert, a planner with the Office of Planning and Zoning, summarized the zoning history and the agency comments. She supported the request.

Mr. Bourquin confirmed that the request is unchanged. He submitted a color-coded site plan depicting the tidal wetlands (approximately nine acres), nontidal wetlands and uplands. The small area of uplands along the eastern boundary of the property is the only developable area large enough for the construction of a dwelling. The dwelling is located approximately 65 feet from the road. The relocation of the dwelling further to the rear would impact steep slopes and increase impervious coverage and woodland clearing. Mr. Bourquin also supplied a copy of the Forest Conservation Easement. He opined that the variance standards are satisfied. Nancy Matthews, an environmental consultant to

¹ The conditions imposed a conservation easement of at least nine acres and proscribed further development.

² Bill No. 04-05 revised, restated and recodified the zoning code effective May 12, 2005. The 100-foot buffer to tidal wetlands - now in Article 18, Section 18-13-104(a) - is unchanged. The 25-foot buffer to nontidal wetlands - now in Article 17, Section 17-6-401 is also unchanged. However, the nontidal wetlands buffer is no longer under the variance authority of this office and is instead subject to the modification authority of the Planning and Zoning Officer. See, Section 17-2-108(a).

the applicant, testified that the site is unchanged from the time of the prior application. The project also includes mitigation.

Area residents Robert Gass and Harry Warren expressed concern for the potential of increased runoff, especially in the view of clearing along Old Bay Highland Avenue. Angela Payne, whose mother owns the adjoining parcel, sought clarification concerning the access. By way of response, Mr. Bourquin indicated that a title search supports the right to improve the access, which consists of 12 feet of paving extending a distance of 185 feet.

Upon review of the facts and circumstances, I find and conclude that the applicant is entitled to conditional relief from the code. In this regard, I adopt the findings and conclusions of the Board's Amended Memorandum of Opinion. In particular, the for this Critical Area property, due to the extent of the tidal wetlands, a strict application of the program would be an unwarranted hardship. To literally interpret the program would forestall the development of the property with a dwelling, which is a right commonly enjoyed by other properties in similar areas in the Critical Area. Conversely, the granting of the conditional variances is not a special privilege typically denied by the program to other Critical Area lands. The request does not result from the actions of the applicant or from land use on neighboring property. And, the granting of the conditional variances does not adversely impact Critical Area assets and harmonizes with the spirit and intent of the program.

I further find that the variances represent the minimum relief and their grant will not alter the essential character of the neighborhood, substantially impair the use or development of adjacent property or constitute a detriment to the public welfare. The approval incorporates the same conditions appended to the Board's Amended Memorandum of Opinion as well as a condition requiring mitigation.

ORDER

PURSUANT to the application of Nancy Hubble, petitioning for a variance to allow a dwelling, driveway and associated facilities with less buffer than required; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 9th day of June, 2006,

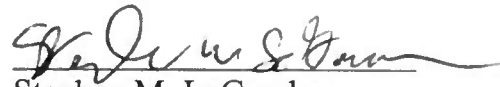
ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicant is **granted** the following variances:

1. A variance of 50 feet to the 100-foot Critical Area buffer for a dwelling.
2. A variance of 47 feet to the 100-foot Critical Area buffer for a driveway.
3. A variance of 55 feet to the 100-foot Critical Area buffer for a grinder pump.

The foregoing variances are subject to the following conditions:

- A. A minimum of nine acres of the subject property shall be accompanied by a Conservation Easement prohibiting further development onto the properties in perpetuity.

- B. Development of the site shall be limited to those structures shown on the variance site plan. No further development on this property (including decks, porch, accessory structures, etc.) shall be permitted.
- C. The applicant shall provide mitigation as determined by the Permit Application Center.


Stephen M. LeGendre
Administrative Hearing Officer

NOTICE TO APPLICANT

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

Further Section 18-16-405(a) provides that a variance expires by operation of law unless the applicant obtains a building permit within eighteen months. Thereafter, the variance shall not expire so long as construction proceeds in accordance with the permit.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, otherwise that will be discarded.

Robert L. Ehrlich, Jr.
Governor

Michael S. Steele
Lt. Governor



Martin G. Madden
Chairman

Ren Serey
Executive Director

**STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS**

1804 West Street, Suite 100, Annapolis, Maryland 21401

(410) 260-3460 Fax: (410) 974-5338

www.dnr.state.md.us/criticalarea/

March 21, 2006

Ms. Ramona Plociennik
Anne Arundel County
Office of Planning and Zoning
2664 Riva Road, MS 6301
Annapolis, MD 21401

RE: Variance 2006-0056-V, Nancy Hubble – Old Highlands Avenue

Dear Ms. Plociennik:

Thank you for providing information on the above referenced variance request. The applicant is requesting a variance to allow a dwelling, driveway, and associate facilities with less Buffer then required. The property is designated as Resource Conservation Area (REA). The property is currently undeveloped and nearly entirely located within the 100-foot Critical Area Buffer.

This office does not oppose a variance to establish a dwelling here; however, impacts must be minimized and the variance the minimum necessary. Based on the information provided, we have the following comments regarding the development proposal and variance request.

- 1) As a matter of clarification, tidal wetlands can not be included in calculations for impervious coverage or lot clearing.
- 2) Mitigation of 1:1 should be required for disturbance outside the Buffer and 3:1 for any disturbance inside the Buffer. Because the site is fully forested, mitigation alternatives will need to be addressed. This office recommends that some plantings be used to manage and treat storm water on the site. Plantings should consist of species similar to the existing natural vegetation in the wetland.
- 3) The letter of jurisdictional determination included in the application packet was dated January 24, 2000. Jurisdictional determinations are only valid for five years.

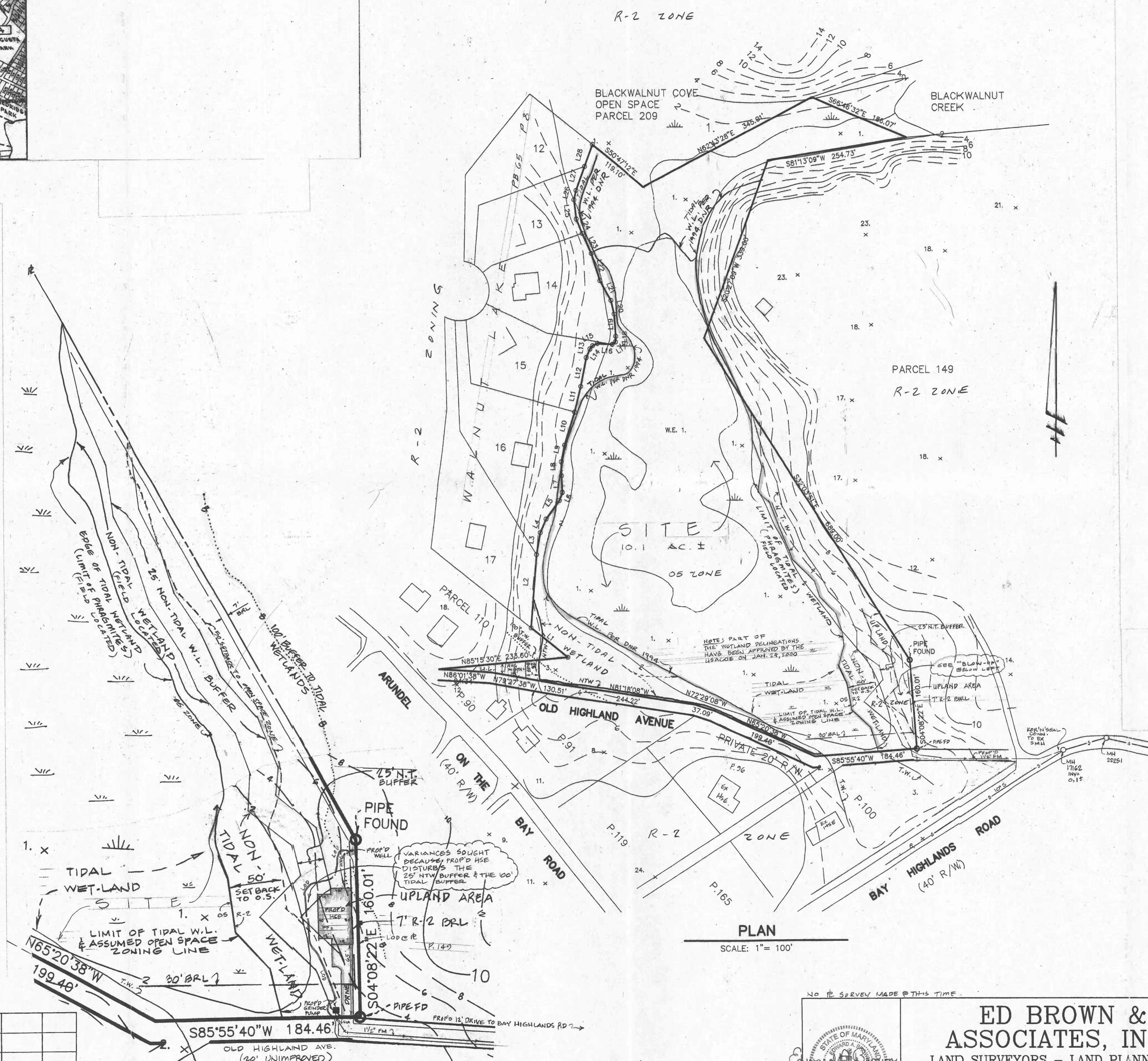
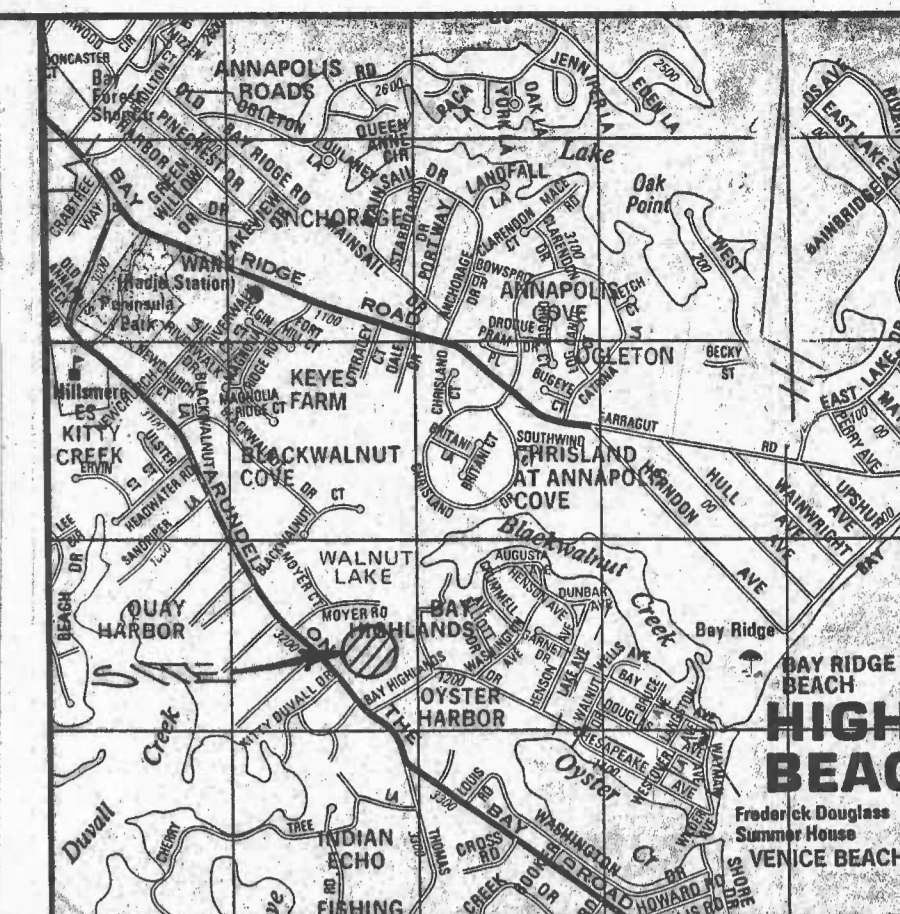
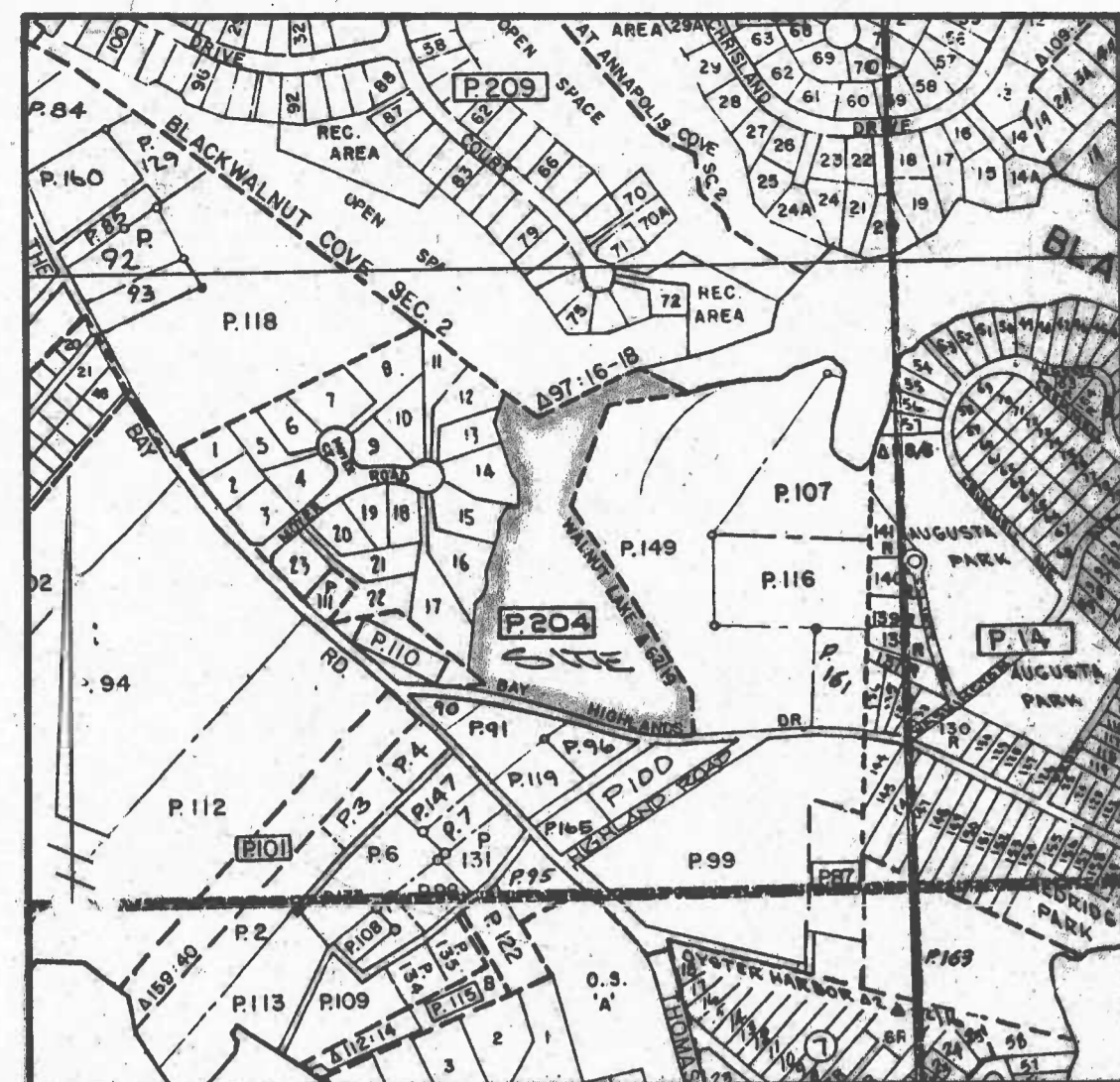
Thank you for the opportunity to provide comments. Please include this letter in your file and submit it as part of the record for this variance. Also, please notify the Commission in writing of the decision made in this case.

Ms. Ramona Plociennik
Variance 2006-0056
March 21, 2006
Page 2

Sincerely,

A handwritten signature in cursive script that reads "Kate Schmidt". The signature is written in black ink and is positioned below the word "Sincerely,".

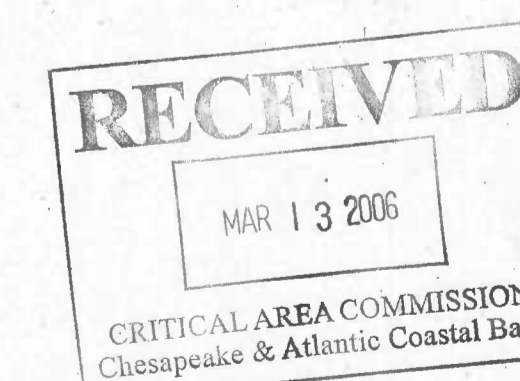
Kate Schmidt
Natural Resource Planner
AA0173-06 222-00



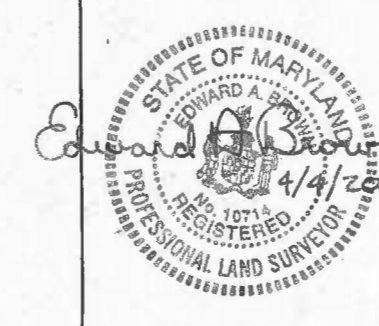
LINE	DIRECTION	DISTANCE
L1	N50°44'30" W	88.56
L2	N20°45'13" E	133.21
L3	N09°59'15" E	46.38
L4	N23°57'45" E	27.08
L5	N37°19'02" E	40.58
L6	N20°28'58" E	15.74
L7	N02°20'49" W	30.53
L8	N00°50'00" W	35.04
L9	N11°46'02" E	25.62
L10	N17°42'35" E	62.48
L11	N14°02'10" E	47.42
L12	N12°54'12" E	53.68
L13	N2°18'54" E	16.55
L14	N39°44'25" E	7.87
L15	N64°47'56" E	9.39
L16	S55°45'49" E	27.07
L17	S33°07'02" E	11.73
L18	S03°20'58" W	9.59
L19	S03°36'19" W	40.71
L20	N12°30'10" W	26.71
L21	N28°08'48" W	41.38
L22	N17°11'09" W	50.57
L23	N23°31'10" W	40.32
L24	N22°44'10" W	24.23
L25	N06°42'35" W	31.23
L26	N1°30'37" E	14.98
L27	N20°47'19" E	46.97
L28	S09°03'00" E	11.91

General Notes

1. Site Reference: TM 57 B 14 P 204
2. Lot area : 10.11 ac. (Reserved Parcel-Walnut)
3. Zoning : R-2, O-S
4. Tax ID #: 2-888-9000 9505
5. Title Reference: 4686/507
6. Owner: HANCOY, Hubble, et al
38 E 25th St # 101
Baltimore, MD 21218-5150
7. Applicant: LONI Moyer
PO BOX 4283
Annapolis, Md 21403
410-263-1133
8. Private well water & Public sewer extension
to be provided.



1	REVISED TO ADD ADDITIONAL WETLAND LOCATIONS (FIELD & DNR MAP)	EBA	11-22-
NO	DESCRIPTION	BY	DATE
	REVISIONS		



**ED BROWN &
ASSOCIATES, INC.**
LAND SURVEYORS - LAND PLANNERS
DEVELOPMENT CONSULTANTS
19 LORETTA AVENUE
ANNAPOLIS, MARYLAND 21401
ANNAPOLIS 410-266-6199 BALTIMORE 410-841-0119

SCALE: AS SHOWN	VARIANCE PLAN
DATE: JANUARY, 2006	RESERVED FARREL WALNUT LAKE
DRAWN BY: JAC	TALK WAS ST, BLOCK 14, PAGES 20
CHECKED BY: DDB	SECOND DISTRICT
JOB NO: 99-228	ANNE ARUNDEL COUNTY, MARYLAND
SHEET \ OF \	FOR LONI MOVER

Judge John C. North, II
Chairman



Ren Serey
Executive Director

**STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREA COMMISSION**

1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338

June 19, 2000

Ms. Charlene Morgan
Anne Arundel County Department of Planning and Code Enforcement
2664 Riva Road, MS 6301
Annapolis, MD 21401

RE: Variance 2000-0145-V, John Hubble

Dear Ms. Morgan:

Thank you for providing information on the above referenced variance application. The applicant is requesting a variance to permit a dwelling with less setbacks and Buffer than required. The property is designated RCA and is currently undeveloped.

The application states that the parcel is 10.1 acres in size and is "mostly a tidal wetland." How much of the lot is state tidal wetlands? This is important because the acreage of state tidal wetlands can not be counted in impervious surface and clearing calculations. Further, can tidal wetlands be included toward the net lot area? How many square feet are actually upland?

Regardless of the above, it does not appear that this parcel is a properly grandfathered buildable lot. It was left over from an old subdivision because it is wetlands and was not buildable at the time of subdivision. The only means of making it buildable now is to obtain variances from the applicable regulations. The parcel is not assessed as being a buildable lot for tax purposes (i.e., a 10.1 acre waterfront lot assessed at \$4,040) nor was it given a lot number (unlike the other lots within Parcel 204). As a non-buildable lot, this office recommends denial of the variances requested.

Thank you for the opportunity to comment. Please include this letter in your file and submit it as part of the record for this variance. Also, please notify the Commission in writing of the decision made in this case.

Sincerely,

A handwritten signature in cursive script that reads "LeeAnne Chandler".

LeeAnne Chandler
Natural Resources Planner

cc: AA222-00

Branch Office: 31 Creamery Lane, Easton, MD 21601
(410) 822-9047 Fax: (410) 820-5093

RECEIVED

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

AUG 2 2002

Petition of
John Hubble, et al.
For Judicial Review of the Decision of
of The Board of Appeals of
Anne Arundel County

No. C-01-76082

(A.A.Co. Bd. of App. Case No. BA54-00V)

OFFICE OF LAWOPINION AND ORDER

This matter was heard by the court on July 17, 2002, on Petitioners' appeal from the decision of the Anne Arundel County Board of Appeals denying a request for a critical areas variance. Present were: Steven P. Resnick, Esq., representing Petitioners and Sarah Iliff, Esq., representing Anne Arundel County.

Facts

Petitioners own a 10.1 acre parcel of land which was reserved "for future development" after their creation of a 1976 subdivision. The parcel originally could not be developed because it would not "perc," but public sewer later was extended to the area.

When Petitioners sought in 2001 to build a single home on the parcel, they sought appropriate authorization from the County and the State, considering that the area had been designated as wetlands subject to critical areas laws in 1988. Anne Arundel County Code, Article 28, Sec. 1A 104, et seq.. Petitioners received authorization for their construction from the State Department of the Environment. Exhibit 6. However, authorization was denied by the County's administrative hearing officer; the denial was affirmed, de novo, by the Board of Appeals.

Issues

In this appeal, Petitioners contend that the Board of Appeals erred in three (3) ways: First, they contend that the Board erred as a matter of law in finding that they were not entitled to seek a variance because their parcel was not a legal "lot" under county law.

Second, they contend that the Board erred as a matter of law in concluding that they "created their own hardship."

Third, they contend that the Board's conclusion in denying the variance also was "not supported by substantial evidence."

1. A parcel is a "lot"

Anne Arundel County, on this appeal, concedes that the Board erred as a matter of law in holding that Petitioners' parcel was not a legally buildable "lot" under the county code. Anne Arundel County Code, Article 28, sec. 1-108.

Relatedly, the County has conceded that the Board was in error when it found "this site must first be certified as a buildable site prior to grant of any variance by this Board." Cf., Anne Arundel County Code, Article 26, sec. 1-111.

2. Petitioners did not create their own hardship

The Board's memorandum of opinion stated that the Petitioners have created their own hardship because Petitioners knew that "the subject parcel would not be permitted to be developed [after their 1976 subdivision] without further approval." Memorandum opinion, at p. 6.

This interpretation of creating one's own hardship plainly is legal error because, as in the White v. North case, (356 Md. 31, at 51-52 (1999)), it would prevent any variance ever from being granted as every variance always would require "further approval."

It is clear that Petitioners did not create the conditions or circumstances of this "hardship" by their own actions; they did not create the wetlands, nor are they responsible for enactment of the critical areas laws. The fact that they seek to build a primary residence on the parcel cannot constitute the "creation of the hardship" or all applicants automatically would face defeat because of the fact that they applied.

Such a nonsensical, "catch-22" interpretation of the laws must be rejected, as discussed above. Id.

To the contrary, the Anne Arundel County Code, Article 3, sec. 2-107 "unwarranted hardship" basis for the grant of a critical areas waiver has been interpreted simply to require that Petitioners show "the denial of their request ... [would be] a denial of a reasonable and significant use." Id. at 48, citing Belvoir Farms v. North, 355 Md. 259, at 382 (1999). In White, it also may be noted that the Critical Areas Commission interpreted the term "reasonable use" to mean a primary residence, such as that proposed by Petitioners herein. Id., at 41.

For all these reasons, the undersigned finds that the Board was legally erroneous on this point as well.

3. Questions as to "substantial evidence" in support of the variance denial

Petitioners point out that they provided substantial support for their application, including its prior approval by the State Department of the Environment, expert testimony of an environmental consultant and testimony of a surveyor as to the site plan, all suggesting that the proposed improvements had been located so as to minimize any environmental impact on the critical areas.

In opposition, the County offered only one witness who provided documentary exhibits, but only testified in a conclusory manner that

[O]ur office feels that this is not a minimal request ... [and that] the proposed improvements will impact these sensitive areas or their buffers if this variance is approved. ... Additionally, the environmental review staff noted that the parcel should be considered a planted habitat protection area as their entire site is either tidal wetlands, non-tidal wetlands, or their associated buffers, which warrant protection from conservation under our current critical area criteria ... T.35-36

The undersigned agrees with Petitioners that this testimony is conclusory. Like that criticized in Mastandrea v. North, (361 Md. 107, at 140 (2000)), it is lacking in specific tests or evaluations of the particular proposed project.

However, the undersigned is mindful that Petitioners have the burden of persuasion and, if they fail to satisfy this, no contrary evidence is required: "An honest doubt is all it takes." Angelini v. Harford County, 144 Md. App. 369 (202). In Angelini, the Court of Special Appeals affirmed the ruling of another local Board of Appeals to the effect that applicants therein failed to meet their burden of persuasion when that Board of Appeals listed several grounds upon which the applicants' case had been "less persuasive than it otherwise might have been." Id.

The undersigned also bears in mind the standard of review for this administrative appeal, that "[t]he order of a county zoning authority 'must be upheld on review if it is not premised upon an error of law and if [its] conclusions 'reasonably may be based upon the facts proven.' " Umerlev v. People's Counsel, 108 Md.App. 497, cert. denied, 342 Md. 534 (1996). The Umerlev court directed that this review be conducted via a "three-step analysis":

1. First, the reviewing court must determine whether the agency recognized and applied the correct principles of law governing the case. The reviewing court is not constrained to affirm the agency where its order "is premised solely upon an erroneous conclusion of law."
2. Once it is determined that the agency did not err in its determination or interpretation of the applicable law, the reviewing court next examines the agency's factual findings to determine if they are supported by substantial evidence, i.e., by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion....
3. Finally, the reviewing court must examine how the agency applied the law to the facts. This, of course, is a judgmental process involving a mixed question of law and fact, and great deference must be accorded to the agency. The test of appellate review of this function is "whether, ... a reasoning mind could reasonably have reached the conclusion reached by the [agency], consistent with a proper application of the [controlling legal principles]."

Id. at 438-39, 508 A.2d 148 (emphasis added, citations omitted).

On the first point, this Court already has confirmed that the decision was based partially "upon an erroneous conclusion of law." The remaining question is whether the Board correctly

applied the appropriate standard for considering the evidence -- that is, whether the application "generally met" the County Code's requirements. White, supra.¹ The undersigned will return to this question after considering the other two steps of the analysis.

On the second point, the undersigned finds that the Board's conclusions are not supported by substantial evidence because, as discussed above, the only specific evidence was presented by the applicants and the County's evidence was, in essence, conclusory and lacking in tests, measurement, or other specifics. There was no indication that any County representative ever had even visited the site. Mastandrea, supra.

On the third point, the undersigned finds that the Board applied the law to the facts herein largely in a speculative manner. The Board's negative environmental findings may be summarized as follows:

(a) That "insufficient evidence has been presented to support a required finding that the variances would not adversely effect water quality, fish ..., [and] wildlife

(b) [That the proposal] would be in harmony with the general spirit and intent of the County's critical area program; and

(c) [That the proposal] "would be acceptable to the clearing and replanting practices in the critical area."

Memorandum opinion, page 7.

The only substantive evidence before the Board on these points was provided by environmental consultant Nancy Matthews, who had visited and evaluated the site, obtaining authorization of project by the Maryland Department of the Environment and approval of the site survey from the Army Corps of Engineers. Cf., Exhibits 2 and 4; also T.14 and 22. Ms. Matthews noted that less than 1% of the site would be disturbed, that "fish, wildlife and plant habitat" would not be significantly affected, and that the variance which would minimize disturbance in a small wetland buffer area "would be in harmony with the general spirit and intent of the County's Critical Area Program." T.23.

The Board also speculated:

(d) [That] "this site clearly contains property that is higher in elevation (in the 6 to 8 foot range) further to the north of the [proposed construction] site ... [which] may less directly impact the wetland areas. However, the Petitioners have failed to provide full site information regarding

¹ The Board in its written opinion recognized the correct legal standard when it stated that the requirements of Anne Arundel County Code, Article 3, sec. 2-107 had not been "generally met" as required in the White, supra case. However, this Court must make its own independent review of whether the standard was correctly applied.

the location of tidal and non-tidal wetlands on the site and their actual boundaries. ... Without this additional information, we are unable to conclude that the portion of the site proposed to be developed ... is actually the portion of the site that would provide the greatest protection to the environment. [Relatedly, the Board complained that it had not] been provided sufficient information to know exactly where the vegetation is located and whether either of these alternative sites (or any other site) for a home would better meet the code criteria." Emphasis added; Memorandum opinion, at pp. 7-8.

Finally, the Board found:

(e) That Petitioners have failed to show that the variance request is the minimum necessary to afford relief ... "We believe that a smaller home, perhaps near to the code minimum ... (600 square feet) would be better suited to this obviously environmentally sensitive property." Relatedly, the Board suggested that Petitioners should consider an alternate building site approximately 250 feet closer to the water, using "access via an adjacent parcel." Memorandum opinion, pp. 7-8.

On these latter two points, the undersigned again finds fault with the Board's consideration of the evidence:

As to the sufficiency of Petitioner's showing of tidal and non-tidal wetlands, Petitioner showed that this was approved by the Army Corps of Engineers ("ACOE"). Cf., note on survey - Exhibit 2 and letter from ACOE - Exhibit 3. While the Court defers to the Board in an area of its expertise, this complaint seems more grounded in ignoring of evidence than in expertise superior to the Army Corps of Engineers.

As to the showing of specifics of vegetation, Petitioners' environmental consultant's report discussed this issue. Exhibit 4. The Board's suggestion of developing the highest and steepest area of the parcel - 250 feet towards the water - suggests that the Board may have ignored this evidence. The report described that portion of the parcel as a "hardwood forested area" which also contains pines in the "6-10" size class." Under related Code provisions, building on such steep slopes and cutting such sizeable trees in the critical areas clearly would present environmental concerns greater than those in the proposed site. Anne Arundel County Code, Chapter 28, sec. 1-104A, et seq.

The only specific evidence offered at the Board's hearing as to other possible sites was that of Petitioners' surveyor Doug Bourquin, who testified that he had evaluated alternate sites but that "[t]his would be the only sufficient upland area...out of the whole 10.1 acres." T. at 11, cf., T. 10-15. The Board's suggestion that Petitioners be required to obtain access to an alternate site via a neighbor's land plainly constitutes error as there is no such requirement or provision in the County Code.

Petitioners reasonably complained that, "although the Board has suggested it was 'unconvinced' that there would not be an adverse impact on critical areas ..., not one member of the Board asked even a single question concerning environmental matters, the site plan, ... the

size or location of the project during the entire course of the hearing." The undersigned agrees with this assessment, noting that the only questions asked by Board members were during Petitioner's case; these fairly extensive questions all anticipated the County's legally erroneous arguments before the Board: 1) that Petitioners' parcel was not a buildable lot and 2) that they created their own hardship. T.20, 37-42.

It is true that the Board has no legal obligation to present an applicant's case or to assist in doing this. Angelini, supra. However, the failure to inquire for information, later found to be critical, when expert witnesses were available to provide such testimony, may create an appearance that the decision-making process is an "arbitrary and capricious" one. And, given the Board's questions which focused only on the legally erroneous issues, it suggests that the Board determined no such inquiry was needed since the Board had been persuaded on the first two issues, discussed above.

Returning to the first step of the Umerly three-step analysis, the undersigned finds that the Board's various errors in applying the law appear improperly to have effected the Board's consideration of the appropriate standard – whether or not the code requirements were "generally met in this case."² White, supra.

For this reason, the court will reverse the decision of the Board of Appeals denying the variance application and remand the case for a new hearing consistent with this Opinion. At the time of the new hearing, both Petitioners and the County may present any additional evidence which is available.

It is so ORDERED on this 30th day of July, 2002 by the Circuit Court for Anne

²This case may be one of the last in Anne Arundel County to apply this liberal standard as to critical area variances. As pointed out by the Assistant County Attorney at the argument on this motion, the Maryland General Assembly recently enacted Senate Bill 326 (2002) for the expressed purpose of overruling the White decision and creating a stricter standard.

However, the Bill provides that it "shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any variance application for which a Petition for Judicial Review ... was filed before the effective date of this Act." Thus, by the terms of the Bill, this case is excluded from its effect.

The County might argue that, because of the remand, any subsequent hearing and new Petition for Judicial Review would be subsequent to the enactment of the Act. For the parties' guidance, the undersigned notes the principle which frequently has been observed by the Court of Appeals that zoning ordinances "are in derogation of the common law right to ... use private property and ... should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language." Appen Hill v. Montgomery County, 265 Md. 303, 313-314 (1972), cited in White, supra. It would appear that the provision as to the effective date of SB326 would be frustrated by an interpretation in which Petitioners, who prevailed in a Petition for Judicial Review and obtained a new hearing, should be denied the benefit of then existing law due to the legal errors committed in the first hearing.

Arundel County.



JUDGE

cc: Steven Resnick, Esq.
Sarah Iliff - Assistant County Attorney

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222-00

RECEIVED

JUN 27 2000

CHESAPEAKE BAY
CRITICAL AREA COMMISSION

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2000-0145-V

IN RE: JOHN HUBBLE, ET AL

SECOND ASSESSMENT DISTRICT

DATE HEARD: JUNE 20, 2000

ORDERED BY: STEPHEN M. LeGENDRE, ADMINISTRATIVE HEARING OFFICER

ZONING ANALYST: CHARLENE MORGAN

DATE FILED: JUNE 26, 2000

PLEADINGS

John Hubble, et al, the applicants, seek a variance (2000-0145-V) to permit a dwelling with less setbacks and buffer than required on property located along the north side of Old Highlands Avenue, west of Bay Highlands Road, Annapolis.

PUBLIC NOTIFICATION

The case was advertised in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 175' of the property was notified by mail, sent to the address furnished with the application. Roger Moyer testified that the property was posted for three to four weeks prior to the hearing. I find and conclude that the requirements of public notice have been satisfied.

FINDINGS AND CONCLUSIONS

This case concerns a 10.11 acre reserved parcel in the Walnut Lake subdivision, Annapolis. The site is waterfront and is split zoned OS Open Space and R-2 residential with a Chesapeake Bay Critical Area designation as Resource Conservation Area (RCA). The applicants seek to construct a single-family dwelling, driveway and grinder pump with impacts to the buffers to tidal waters and nontidal wetlands. Specifically, the dwelling is 50 feet from tidal waters, the driveway is 53 feet from tidal waters and the grinder pump is 45 feet from tidal

waters. Additionally, the dwelling is 21 feet from nontidal wetlands, the driveway touches nontidal wetlands, and the grinder pump is three feet inside the nontidal wetlands.

The Anne Arundel County Code, Article 28, Section 1A-104(a)(1) establishes a minimum 100-foot buffer landward from the mean high-water line of tidal waters and a 25-foot buffer surrounding nontidal wetlands. Accordingly, the proposal necessitates variances as follows:

1. To the tidal waters buffer, a variance in the amount of 50 feet for the dwelling, 47 feet for the driveway and 55 feet for the grinder pump;
2. To the tidal wetlands buffer, a variance of four feet for the dwelling and a full variance for the driveway; and
3. A variance to permit the grinder pump within nontidal wetlands.

Charlene Morgan, a zoning analyst with the Department of Planning and Code Enforcement, testified that when the Walnut Lake subdivision was platted in 1976, the site wetlands were recognized and designated as a reserved parcel. The parcel would have to go through subdivision before it can be considered a legal lot. The witness contended that the proposal impacts sensitive areas and does not represent a minimal request with any hardship self-created. She recommended that the application be denied.

Douglas Bourquin, the applicants' engineer, testified that the applicants have owned the land since 1973. The 1976 subdivision plat reserved this site and seven

building lots pending the availability of sewer service. With the subsequent availability of sewer service, the seven reserved building lots were developed. The current proposal attempts to site a dwelling on uplands with minimal impact to the buffers. The witness also stated that the project is pending a subdivision waiver.

Nancy Matthews, the applicants' environmental consultant, testified that she delineated the tidal and nontidal wetlands which determinations have been verified by the Corps of Engineers. Additionally, the applicants have received authorization to disturb the wetlands.

Mr. Moyer testified that he discussed the reserve status of the parcel with the then Planning and Zoning Officer shortly after the plat was recorded. He anticipated that the site would be available for future development. More recently, the subdivision section advised him to pursue the variances in advance of the waiver decision.

Colonel (Ret.) D. B. Carnie, an area resident, testified in opposition to the request. He expressed concern about the impacts to wildlife from the proposed intrusions into the buffers.

The standards for granting variances are contained in Section 11-102.1. Under subsection (b), for a property in the Critical Area, a variance to the Critical Area program requirements may be granted if (1) due to features of the site or other circumstances, a strict implementation of the program would result in an unwarranted hardship to the applicants; (2) a literal interpretation of the program

will deprive the applicants of rights commonly enjoyed by other properties in similar areas within the Critical Area; (3) the granting of the variance will not confer on the applicants any special privilege that would be denied by the program to other lands within the Critical Area; (4) the variance request is not based on circumstances resultant of actions by the applicants and does not arise from conditions relating to land use on neighboring property; and (5) the granting of the variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the Critical Area and will be in harmony with the general spirit and intent of the program. Under subsection (c), any variance must be the minimum necessary to afford relief; and its grant may not alter the essential character of the neighborhood, substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare.

In Anne Arundel County, Critical Area variances are measured against the unwarranted hardship standard. The issue is whether the denial of the application is a denial of "reasonable and significant use." Belvoir Farms Homeowners Association, Inc., v. North, 355 Md. 259 (1999). The factors enumerated in the variance statute "cannot be construed individually to overrule a finding of unwarranted hardship..." White v. North, 356 Md. 31 (1999).

Upon review of the facts and circumstance, I am unable to grant the requested relief. Despite the applicants' expectations, the acreage remains a mere reserve parcel rather than a properly grandfathered buildable lot. Given its status as a reserve parcel, there is no hardship. The general rule is that the creation of a new



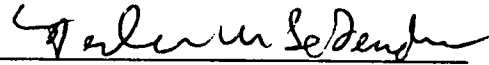
lot cannot give rise to the need for a variance. See, in Re: Brent Kurrle, 1998-0071-V (May 13, 1998).

ORDER

PURSUANT to the application of John Hubble, et al, petitioning for a variance to permit a dwelling with less setbacks and buffer than required; and

PURSUANT to the advertising, posting of the property, and public hearing and in accordance with the provisions of law, it is this 26 day of June, 2000,

ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicants' request is hereby **denied**.


Stephen M. LeGendre
Administrative Hearing Officer

NOTICE TO APPLICANT

Within thirty (30) days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this order, otherwise they will be discarded.

**RE: An Appeal For Variances To The
Zoning Regulations**

**JOHN HUBBLE, et al
Petitioners**

* **BEFORE THE**
*
* **COUNTY BOARD OF APPEALS**
*
* **OF ANNE ARUNDEL COUNTY**
*
* **CASE NO. BA 54-00V**
* **(2000-0145-V)**
*
* **Hearing Date: July 31, 2001**
*
*

MEMORANDUM OF OPINION

Summary of Pleadings

This is an appeal from a decision of the Administrative Hearing Officer. This appeal is taken from the denial of a variance to permit the construction of a dwelling with fewer setbacks and buffer than required. The property is located 900 feet along the north side of Old Highlands Avenue, 200 feet west of Highland Road, Annapolis.

Summary of Evidence

Mr. Douglas Bourquin, a surveyor and land planner, testified that the Petitioners propose to construct a 1,750 square foot home on 10.1 acres. When the property was subdivided, the subject parcel was reserved for future development. There are significant quantities of wetlands on the property. The proposed home will be constructed on the upland area of the property but will be within the required 100-foot buffer from tidal wetlands and the required 25-foot buffer to non-tidal wetlands. Mr. Bourquin explained that a house could not be located on the property without some form of variance. Ms. Nancy Matthews prepared the wetland report and sent it to the Maryland Department of the Environment. The Petitioners sought a waiver to the sketch plan requirements. The Office of Planning and Zoning indicated that a Critical Area delineation must be performed first and suggested that the Petitioners apply for a variance. The waiver request was placed on hold until the variance request was complete. On questioning, Mr.

Bourquin explained that there would be no storm water management since there would be less than 5,000 square feet of disturbance, but water quality management would be performed.

Ms. Nancy Matthews testified that she prepared the Critical Area report for the property and obtained the appropriate approvals to disturb the buffer. She believes that the spirit and intent of the Critical Area regulations will be met since less than one percent of the entire will be disturbed by the proposed construction. The lot was subdivided in 1976, well before the adoption of the Critical Area regulations.

Mr. Roger Moyer testified that he applied for the subdivision of the entire parcel in 1976. The parcel was percolation tested. The subject ten-acre property did not obtain a positive perc test. Additionally, lots 11, 12, 13 and 15 shown on the plat were designated as not buildable until sewer service became available. Sewer is now available to serve the subdivision. The sewer main is in close proximity to the ten-acre parcel. Therefore, the Petitioners seek approval to construct on the parcel. He was told to get a variance and a waiver. Mr. Moyer explained that he has lived in the area his entire life. He is familiar with the development in the area and believes that the requested variance will not be a detriment to the community.

Ms. Patricia Miley, a planner with the Office of Planning and Zoning, testified that the applicant is requesting a variance to permit a dwelling with fewer setbacks and buffer than required. The subject property consists of 10.1 acres and is labeled "Reserved For Future Development Not Part Of This Project" on the plat of the Walnut Lake Subdivision. The property has been zoned R2-Residential and OS-Open Space since 1985. This is a waterfront lot located in the Critical Area and is classified as Resource Conservation Area. The applicant proposes to develop this site with a single-family dwelling, driveway and grinder pump within the required buffer to tidal wetlands and non-tidal wetlands. Section 1A-104(a)(1) of the Anne Arundel County Zoning Ordinance requires that there shall be a minimum 100-foot buffer landward from the mean high water line of tidal waters, tributary streams and tidal wetlands.

The applicant is proposing to construct a single-family dwelling approximately 50 feet from the edge of tidal wetlands, construct a driveway approximately 53 feet from the tidal wetlands and install the grinder pump approximately 45 feet from the tidal wetlands. As such, these proposals will necessitate a variance of 50 feet to the 100-foot Critical Area buffer for the dwelling, a variance of 47 feet to the 100-foot Critical Area buffer for the driveway and a variance of 55 feet to the 100-foot buffer for the grinder pump. Furthermore, Section 1A-104(a)(1) requires a minimum 25-foot buffer surrounding all non-tidal wetlands. The applicant is proposing to locate the dwelling approximately 21 feet from the edge of the non-tidal wetlands, the driveway zero feet from the non-tidal wetlands and the grinder pump within three feet of the non-tidal wetlands. The proposed construction will, therefore, necessitate a variance of four feet to the 25-foot non-tidal wetlands buffer for the dwelling, a variance of 25 feet to the buffer for the driveway and a variance of 22 feet to the buffer for the grinder pump. Ms. Miley explained that her office does not recognize the subject parcel as a building site. The applicant must obtain variances to both the Critical Area criteria and the Zoning Regulations and obtain subdivision approval for the property. She does not believe that this variance is a minimum request. She believes that the proposed improvements will significantly impact the sensitive environmental features of this site. Both the Critical Area Commission and the Environmental Review Staff of the Permit Application Center have recommended that the application be denied.

All testimony was stenographically recorded and the recording is available to be used for the preparation of a written transcript of the proceedings.

Findings and Conclusions

The Petitioners are proposing to construct a dwelling on property within the R2-Residential and OS-Open Space District on waterfront property within the RCA of the Critical Area. The Anne Arundel County Code requires that there be a minimum 100-foot buffer landward from the mean high water line of tidal waters, tributary streams and tidal wetlands.

See, Anne Arundel County Code (the "Code"), Article 28, Section 1A-104(a)(1). The applicant is proposing to construct a single-family dwelling approximately 50 feet from the edge of the tidal wetlands, construct a driveway approximately 53 feet from the tidal wetlands and install a grinder pump approximately 45 feet therefrom. As such, the Petitioners have requested variances of 50 feet to the 100-foot Critical Area buffer for the dwelling, a variance of 47 feet to the buffer for the driveway and a variance of 55 feet for the grinder pump. Section 1A-104(a)(1) also requires a minimum 25-foot buffer surrounding all non-tidal wetlands. The applicants are proposing to locate the dwelling approximately 21 feet from the edge of the non-tidal wetlands, the driveway zero feet from the non-tidal wetlands and the grinder pump within three feet of the non-tidal wetland area. The proposed construction will, therefore, also necessitate variances of four feet to the 25-foot non-tidal wetlands buffer for the dwelling, a variance of 25 feet to the buffer for the driveway and a variance of 22 feet to the buffer for the grinder pump.

The subject property consists of approximately 10 acres of land. Nearly the entirety of the property is impacted by tidal and/or non-tidal wetlands. Only a small area around the perimeter of the property is upland area. See, Petitioners' Exhibit 2. It is clear from the site plan that development on this property would be difficult without some form of variance from the Code criteria. In order to obtain the requested variances, however, the Petitioners must show compliance with Article 3, Section 2-107 of the Code. This Code section authorizes the granting of variances to the requirements of the Critical Area Program in certain instances. As a threshold matter, we find that these Petitioners are not currently eligible for the grant of a variance. The County Code provides that variances may be granted only after determining that "because of certain unique physical conditions, such as exceptional topographic conditions peculiar to and inherent in the particular lot, or irregularity, narrowness or shallowness of lot size and shape, strict implementation of the County's Critical Area Program would result in an unwarranted hardship to the applicant". See, id. Section 2-107(b)(1), emphasis added. This Code section

requires a careful examination of the lot characteristics. We find that this ten-acre parcel is specifically not a "lot". This parcel was "reserved for future development" on the subdivision plat for Walnut Lake, dated August 1976. See, Petitioners' Exhibit 1. The Petitioners, including Mr. Moyer and Mr. Hubble, signed the plat for Walnut Lake on September 17, 1976. They were among the original property owners of the Walnut Lake Subdivision property totaling 25.028 acres of property. Due to difficulties obtaining satisfactory percolation tests on the entirety of the Walnut Lake Property, certain of the then approved lots were designated as "not buildable until the availability of public sewage systems and are reserved parcels subject to future subdivision approval". The reserved parcel that is the subject of the current variance request was not included in the conditional lot approval shown on the Walnut Lake Subdivision. This reserved parcel was specifically noted as "not part of this project".

The subject ten-acre reserved parcel is simply not a legally buildable parcel. The Petitioners must obtain subdivision approval and convert the reserved parcel into a "lot" prior to the consideration of a variance request. Once the property is subdivided (assuming it is able to meet the current subdivision standards) the Board would then be in a position to consider and know the actual dimensions and features of this property. Although unlikely, this ten-acre parcel may well be divided into additional buildable parcels or perhaps re-configured in some way to include a portion of the property into the existing lots or created as a separate conservation area, which maybe enjoyed by the residents of the subdivision or preserved to a more public use. Until the property is officially designated a buildable parcel, the exact placement of a structure, if any, is premature.

Assuming arguendo, that the subject, reserved parcel is a properly buildable parcel, the Petitioners have failed to meet the criteria for a variance to the Critical Area standards. It is now well settled that in order to obtain the requested variances, an applicant must show that the denial of the request would result in an "unwarranted hardship". See, Belvoir Farms Homeowner's

Association, Inc. v. North, 355 Md. 259, 734 A.2d 227 (1999). The Court made clear that the “unwarranted hardship” standard is less restrictive than an unconstitutional taking standard. The key to determining whether an unwarranted hardship exists is whether an applicant would be denied a “reasonable and significant” of the applicant’s property if the permission requested were not granted.

We acknowledge that this property, as it is currently configured, is significantly impacted by unique physical conditions in the form of both tidal and non-tidal wetlands. See, Code, Article 3, Section 2-107(b)(1). When the standard 100-foot Critical Area buffer from tidal wetlands is applied to the property, very little if any of the property will be outside the required buffer (with the possible exception of the extreme southwestern corner of the property). A major issue in this case, however, is the appropriate location and size of any structure relative to the unique environmental features.

In keeping with the guidance of the Court of Appeals in White V. North, 356, Md. 31, 736 A.2d 1072 (1999), the Board finds that the additional criteria of the Code, Article 3, Section 2-107 have not been “generally met”. Of great significance in this case is that the Petitioners have created the hardship inherent on this property. See, id. Section 2-107(b)(4)(i). The Petitioners were the applicants for the Walnut Lake Subdivision. The subject 10.1 acres of the property was reserved for future development since it did not pass percolation tests. In fact, the property must have been considered so far removed from potential development that the 10 acre parcel was not even included in the conditional approval for subdivision regarding lots 3, 11, 12, 13, 14, 15 and 20, which were reserved for building subsequent to the availability of a public sewage system. Furthermore, the Petitioners signed the plat indicating that the 10 acre area of “PRIVATE WETLANDS” was “RESERVED FOR FUTURE DEVELOPMENT” and “NOT PART OF THIS PROJECT” in 1976. It is clear that the Petitioners knew that the subject parcel would not be permitted to be developed without further approval.

We also believe that insufficient evidence has presented to support a required finding that the variances would not adversely affect water quality, fish and wildlife of plant habitat and would be in harmony with the general spirit and intent of the County's Critical Area Program and would be acceptable to the clearing and replanting practices in the Critical Area. See, id., Section 2-107(b)(5)(i), (b)(5)(ii) and (c)(2)(iii). The Petitioners propose the construction of a 30 by 50 foot home at an elevation of two to six feet. The proposed improvements are concentrated near the roadway and at the southeast corner of the property. We are not convinced that the construction of a 30 by 50 foot dwelling at ground zero to impact the non-tidal wetland area would be in keeping with the general spirit and intent of the County's Critical Area Program and the necessary protection of the sensitive environmental features. This site clearly contains property that is higher in elevation (in the six to eight foot range) further to the north of the site along the eastern boundary. Development in this portion of the site may less directly impact the wetlands area; however, the Petitioners have failed to provide full site information regarding the location of tidal and non-tidal wetlands on the site and their actual boundaries. See, Petitioners' Exhibit 2. Without this additional information, we are unable to conclude that the portion of the site proposed to be developed by the Petitioners is actually the portion of the site that would provide the greatest protection to the environment. We also note that the development of the property with a house further interior to the site could potentially include access via an adjacent parcel and could reduce impacts to any of the wetland areas on site. There may be a portion of the site at the extreme southwestern corner that may also include some property beyond environmental constraints. Perhaps, a combination of side, rear and front yard setbacks may be in the best interest of the environment and could avoid at least some of the Critical Area variances sought for the proposed variance portion of this site. Without more information, however, this Board is unable to conclude that the proposed portion of the site is the best site for development. We also note that while the forest and vegetative cover of the site was described in

the Critical Area Report and by the witnesses, we have not been provided sufficient information to know exactly where the vegetation is located and whether either of these alternative sites (or any other site) for a home would better meet the Code criteria.

Further, the Petitioners have failed to show that the variance request is the minimum necessary to afford relief. See, id., Section 2-107(c)(1). As stated, there may be alternative locations for a house on the property (assuming, this is a buildable parcel). The portion of the property approximately 250 feet into the interior of the site along the eastern boundary contains property that is higher in elevation and may well result in improvements further from the non-tidal and tidal wetlands. In addition, the Petitioners propose the development of a house 30 feet wide by 50 feet in depth. We believe that a smaller home, perhaps nearer to the Code minimum for a dwelling (600 square feet), would be better suited to this obviously environmentally sensitive property. Assuming that the property is a buildable lot, the improvement of the site with a small dwelling would provide the Petitioners relief from the Code criteria while also providing the environment with at least minimal protection.

The Petitioners have provided a partial application for variance approval considering only the southeastern corner of the site. This site must first be certified as a buildable site prior to the grant of any variance by this Board. Additionally, if the Petitioners receive the approval of the subdivision, the Petitioners should be ready to address the entirety of the 10.1-acre parcel as a potential building site before this Board will consider the grant of a variance. Interestingly, the Petitioners presented the Board with notes from a meeting dated February 16, 2000 where the site was discussed with the County as a potential building site. Item No. 4 noted that the probability of approval before the Board of Appeals was 50/50. See, Petitioners' Exhibit 6. Clearly, the odds were much lower.

ORDER

For the reasons set forth in the foregoing Memorandum of Opinion, it is this 17th day of October, 2001, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners' request for variances to the Critical Area Regulations contained in Anne Arundel County Code, Article 28, Zoning, Section 1A-104(a)(1) are hereby denied.


Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

If this case is not appealed, exhibits must be claimed within 60 days of date of the expiration of the appeals period; otherwise, they will be discarded.


Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Mary M. Leavell, Clerk.

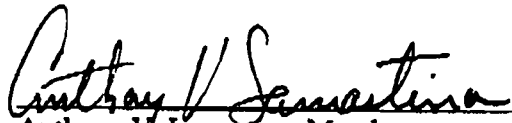
**COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY**


Christopher H. Wilson, Chairman


William Moulden, Vice Chairman


Ray J. Jicka, Member


William C. Knight, III, Member


Anthony V. Lamartina, Member


Carmen A. Perry, Member

(C. Ann Abruzzo, Member, did not participate in this appeal).